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Historic Preservation and Free Exercise: The Exclusion of Churches from Historic Preservation Funding

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Introduction

With the passage of the National Historic Preservation Act in 1966, and the founding of the New York Landmark Preservation Commission the year prior, the passed legislation reflected a concerted effort to preserve the structures important to American history.[1] Historic preservation legislation and subsequent commissions have proliferated on the state, county, and local level over the more than half-century since the passage of the NHPA. Despite this legislative effort, historic religious structures are often ineligible for historic preservation funding. This paper will explore the friction between the Free Exercise Clause of the United States Constitution and no aid clauses of various state constitutions, which in some cases have precluded the use of state historic preservation funds to churches. Based on the Supreme Court's recent ruling in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, historic preservation funding should be available for use by owners of historically designated religious buildings. Failure to provide a generally available benefit, available in a historic preservation fund, inhibits the free exercise of religion.

This paper is divided into four parts. Section one will address the history of both the no aid and Blaine Amendment provisions of state constitutions discussed in later state and federal cases. Also discussed is the 1973 Supreme Court case *Committee for Public Ed. and Religious Liberty v. Nyquist*,[2] and a 2003 Office of Legal Counsel memo that discussed *Nyquist* and the applicability of historic preservation grants to active religious buildings.[3] Section two will discuss

[1] The Congressional Declarations of the National Historic Preservation Act includes the flowing:
"…the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
…the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans" (16 U.S.C. 470(b)(2,4)); *See generally* Madeleine Randal, *Holy War: In the Name of Religious Freedom, California Exempts Churches from Historic Preservation*, 37 SANTA CLARA L. REV. 213 (1996).

[2] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[3] *Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church*, 27 Op. Att'y Gen. 91 (2003).

recent Supreme Court precedent, namely the 2003 case *Locke v. Davey*[4] and the 2017 case *Trinity Lutheran Church of Columbia, Inc. v. Comer*;[5] these cases discuss the relationship between the federal Free Exercise Clause and state exclusions of religious activity from funding programs. The next section will discuss state and federal court decisions regarding general and historic preservation funding for religious buildings, along with the impacts of state constitutions on the outcome of those cases. Section four will discuss the case currently before the Supreme Court, *Espinoza v. Mont. Dep't of Revenue*[6], and how it may affect future free exercise cases in the context of historic preservation. Based on the Court's holding in *Trinity Lutheran*, subsequent changes to Court membership, and Justice Kavanaugh's recent concurrence to the denial of certiorari in *Freedom From Religion Foundation v. Morris County Board of Chosen Freeholders*[7], the Court will likely adopt a more expansive interpretation of the Free Exercise Clause.

I. Compelled Support Clauses, the History of the Blaine Amendments, and *Nyquist*

Underlying the state court cases interpreting the constitutionality of historic preservation funding for religious buildings are state establishment clauses. Of the four cases interpreted in part III, two, New Jersey and Vermont, have a compelled-support/no-aid clause that pre-date Blaine Amendments,[8] and in the case of New Jersey, pre-dates the founding of the United States.[9] Blaine Amendments are post-Civil War amendments to state constitutions birthed largely out of anti-Catholic sentiment.[10] Massachusetts and Michigan are Blaine Amendment states.

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[4] Locke v. Davey, 540 U.S. 712 (2003).
[5] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).
[6] Espinoza v. Mont. Dep't of Revenue 435 P.3d 603 (2018).
[7] Freedom from Religion Found. v. Morris Cty. Bd. of Chosen Freeholders, 232 N.J. 543 (2018).; Morris Cty. Bd. of Chosen Freeholders v. Freedom From Religion Found., 139 S. Ct. 909, 910 (2019) (Kavanaugh, J., concurring in the denial of certiorari).
[8] Locke v. Davey, 540 U.S. 712, 723 (2003).
[9] *See* EAST-JERSEY CONST. art. XVI; *The Fundamental Constitutions for the Province of East New Jersey in America, Anno Domini 1683*, YALE.EDU, https://web.archive.org/web/20061205053838/http://yale.edu/lawweb/avalon/states/nj10.htm (last visited Dec.12, 2019). ("nor shall they be compelled to frequent and maintain any religious worship, place or ministry whatsoever").
[10] Richard D. Komer, *Law and Schools: A Fresh Look at the Role of Courts in Addressing Problems in Education: Trinity Lutheran and the Future of Educational Choice: Implications for State Blaine Amendments*, 44 WM. MITCHELL L. REV. 551, 610 (2018).

A. The New Jersey and Vermont Compelled Support Clauses

The New Jersey Constitution's compelled support clause predates the Blaine Amendments and was likely birthed out of the separationist Quaker influence, and religious diversity in the state. New Jersey was split in two colonies, East and West Jersey. The East Jersey constitution, ratified in 1683, had a similar compelled Religious Aid Clause as the later 1776 and modern New Jersey constitution.[1112] The modern iteration of the New Jersey Religious Aid Clause appears in Article IV and reads, in pertinent part:

> nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.[13]

The most troubling issue, for the purposes of historic preservation is the specificity of Article IV. Because it includes the term "repairing" and the lack of a purpose inquiry, so any payment to a church is forbidden, no matter if it were for the forbidden purpose of establishment, or for the purpose of historic preservation. The lack of a purpose prong was a sticking point for the New Jersey Supreme Court in *Freedom From Religion Foundation v. Morris County Board of Chosen Freeholders*.[14] The court in *FFRF* noted the historical difference between Blaine and the New Jersey Religious Aid Clause, saying it is a remnant from the state's original Constitution and "long pre-dated the Blaine Amendments and reflected a concern for religious freedom, not discrimination or hostility toward a particular religion."[15]

Similarly, Article III of the Vermont Constitution has a compelled support clause. It dictates, "that that no person ought to, or of right can be compelled to attend any religious worship,

[11] *See supra* note 7.
[12] The 1683 constitution also forbade non-Christians from holding a position of "publick-trust".
[13] NJ CONST. art.I, ¶ 3.
[14] Freedom from Religion Found. v. Morris Cty. Bd. of Chosen Freeholders, 232 N.J. 543 (2018).
[15] *Id*. at 561.

or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience…"[16] The Vermont provision has a more general compelled support clause compared to the New Jersey clause. In *Taylor v. Town of Cabot*, the Vermont Supreme Court denied a preliminary injunction, when it declined to assume that providing historic preservation funding to a church for exterior maintenance equates to "support" under the compelled support clause.[17]

B. The History of Blaine Amendments

The term "Blaine Amendment" stems from the 19th Century congressman, James Blaine, who proposed an amendment to the United States Constitution. The original Blaine Amendment was proposed in 1875 and failed to gain the requisite two-thirds majority in the Senate. It read:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations. [18]

Thirty-seven states adopted Blaine Amendments in varying forms.[19] At a brief glance, it reads as an expanded Establishment Clause, limiting tax money or public land, linked to education from being disbursed to religious sects. However, it was part of a larger anti-Catholic movement in American history.[20] At the time public schools were in effect schools of Protestant affiliation.[21] Put plainly, the ostracism of Catholics from the public-school system led to the proliferation the non-public Catholic Schools. Blaine Amendments were an attempt to limit funding to these non-public schools.

C. Supreme Court and Executive Action regarding "Maintenance and Repair"

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[16] VT CONST. ch 1, art. III.
[17] Taylor v. Town of Cabot, 178 A.3d 313, 325 (2017).
[18] H.R.J. Res. 1, 44th Cong. (1875).
[19] Komer, *supra* note 10 at 552.
[20] *Id*. at 610.
[21] *Id*. at 554-559.

In the 1973 case *Committee for Public Ed. and Religious Liberty v. Nyquist*, the Supreme Court invalidated a portion of a New York Law, which in relevant part, provided for the maintenance and repair[22] of nonpublic schools.

The Court applied the three-part *Lemon* test, which asks whether the maintenance and repair provision first had a "clearly secular legislative purpose, … ha(d) a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion…"[23] In application, the Court reasoned that, though the program had the general permissible purpose of advancing education, the grants had the impermissible effect of advancing religion.[24] As the New York law had the impermissible effect of advancing religion, in violation of the Establishment Clause. One reason is that, of the 2,038 non-public schools in New York, only 296 were non-religious, with 1,415 being Roman Catholic.[25] The majority of the aid was directed to religious institutions. More importantly, the aid did not limit recipients from "paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities."[26]

Thirty years after the decision in *Nyquist*, the Department of Justice Office of Legal Counsel issued an opinion on the constitutionality of providing Historic Preservation Grants to Historic Religious Properties. The program at issue was the "Save America's Treasures" administered by the Parks Service.[27] Using Boston's Old North Church as a prototypical example,

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[22] Maintenance and repair means "the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils" *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 763 (1973).

[23] *Id*. at 773 (citing Lemon v. Kurtzman, 403 U.S. 602, 612—613 (1971)).

[24] *Id*. at 779.

[25] *Id*. at 794, n. 23.

[26] *Id*. at 774.

[27] *Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church*, 27 Op. Att'y Gen. 91, 97 (2003).

the OLC concluded that providing historic preservation grants would not violate the Establishment Clause. The purpose of providing such grants would be to "preserve our national heritage."[28] The program does not have the effect of advancing religion, based on the wide array of recipients.[29] In addition, the OLC largely dismissed the entanglement prong of the Lemon test, as they stated, "there is no more governmental monitoring of aid recipients here than in other cases in which the Court has not questioned the provision of aid under Lemon's entanglement prong."[30] The OLC came to this conclusion even though Old North Church was an active Episcopal Church.[31]

The OLC distinguished *Nyquist* by raising similar issues as the Court in *Locke v. Davey*[32], decided in the same year as when this OLC opinion was issued.[33] The OLC distinguished the maintenance and repair provision of *Nyquist* by emphasizing the heightened Establishment Clause interest in the realm of education.[34]

II. Recent Supreme Court Precedent

Decided in 2003, *Locke v. Davey* added a wrinkle to the Establishment Clause analysis and was a departure from the Court's previous approach in *Nyquist.* In *Locke*, the respondent, Davey, sought to use funding from Washington's Promise Scholarship Program in pursuit of a devotional theological degree.[35] The state of Washington excluded degrees in devotional theology from the Program.[36] When Davey learned he could not use funds for a devotional degree he brought a § 1983 suit, arguing that, *inter alia*, the denial of the scholarship violated the Free Exercise Clause.

[28] *Id*. at 102 n. 7; See 16 U.S.C. § 470a(e)(4).
[29] *Id*. at 106.
[30] *Id*. at 102 n. 7.
[31] *Id*. at 98.
[32] Locke v. Davey, 540 U.S. 712 (2003).
[33] *See infra* Section II.
[34] *Id*. at 103.
[35] *Locke*, 540 U.S. at 717.
[36] *Id*. at 715.

The United States Supreme Court held the State of Washington may constitutionally deny Davey the scholarship for the devotional theology degree.[37] The Court reasoned that this case falls squarely in the void, or the "play in the joints"[38] between the Free Exercise Clause and Establishment Clause. This entails an area of law in which state action is permitted by the Establishment Clause, but not required under the Free Exercise Clause. Thus, the state's Establishment Clause interest in not funding Davey's degree, or more broadly the education of clergy is permissible. [39] The state was not required to fund the degree because of free exercise. In addition, the program did not facially discriminate against religion, nor was there animus towards religion; rather the state "merely chose[] not to fund a distinct category of instruction."[40] Not funding the education of an individual, who planned to use such degree to become a minister was an allowable exception, falling between the Establishment Clause and Free Exercise Clause.

Clarified in dicta, the issue focused on what the funds were used for, not who received the funds. Chief Justice Rehnquist made clear that individuals who attended religiously affiliated schools, would still be eligible for scholarships under the program, only the pursuit of a devotional theological degree is an issue.[41] Since paying for theological training was associated with established churches in the colonial and early republic era, the narrow exception in *Locke* was reasonable.[42]

More recently, the Supreme Court decided *Trinity Lutheran*.[43] The case involved the seemingly mundane issue of a Missouri Scrap Tire Resurfacing Grant Program. However, the program had a strict policy of denying all religiously affiliated applicants, due to the Missouri

[37] *Id*. at 725.
[38] Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970).
[39] *Locke*, 540 U.S. at 722.
[40] *Id*. at 721.
[41] *Id*. at 724.
[42] *Id*. at 723.
[43] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

Department of Natural Resources' interpretation of the no-aid clause in the Missouri Constitution.[4445] If Trinity Lutheran were not a religious entity, it likely would have received funding. It was fifth overall of forty-four candidates in eligibility based on various need-based criteria, including poverty level of the surrounding area and the applicant's plan for recycling.[46] Fourteen plans were approved by the Missouri Department of Natural Resources, and based on eligibility the church was well within the number of projects approved.

After being denied the Playground Resurfacing Grant, Trinity Lutheran filed suit, claiming that the "Department's failure to approve the Center's application, pursuant to its policy of denying grants to religiously affiliated applicants, violates the Free Exercise Clause of the First Amendment."[47] The Court held that the Department's policy of exclusion violated the Free Exercise Clause, as it prohibited a public benefit based on an entity's religious status.[48] The Court reasoned that Trinity Lutheran was given a choice between "being a church, and receiving a government benefit", which created a categorical exclusion for churches.[49]

Chief Justice Roberts emphasized the case was distinguishable from *Locke*, as Davey was denied the scholarship, not because of his religious affiliation, but because of what he wanted to do with the funds, namely attain a devotional theology degree.[50] Here however, Trinity Lutheran was denied a grant for playground resurfacing simply because of its religious status. They are "put to the choice between being a church and receiving a government benefit." [51] As there was an

[44] *Id.* at 2017.
[45] The pertinent clause of the Missouri Constitution reads, "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." (MISS. CONST. art. I § 7.)
[46] *Trinity Lutheran*, 137 S. Ct. at 2017.
[47] *Id.* at 2018.
[48] *Id.* at 2024.
[49] *Id.*
[50] *Id.* at 2023
[51] *Id.* at 2024

absolute bar on religious eligibility, strict scrutiny applied. The state did not specify a state interest beyond broad-brush Establishment Clause concerns.

It is worth noting the infamous footnote three in Trinity Lutheran. Footnote three limits the holding solely to the issue of playground resurfacing, and reads, "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[52] Justices Thomas and Gorsuch split from the majority, in part due to the limiting effects of the footnote.[53] In his concurrence, Justice Gorsuch reasoned that the footnote made the holding unreasonably narrow, possibly limited only "playground resurfacing" cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy…"[54] Justice Breyer concurred in the judgment.[55] Therefore, though *Trinity Lutheran* was a 7-2 opinion, only four Justices joined the opinion contained in footnote three.

With a split over the how to interpret *Trinity Lutheran*, based on a four Justice plurality in footnote three, there is an open question to how the case will impact future law. However, with Justice Kennedy's retirement, his replacement Justice Kavanaugh has already displayed an affinity for a broad interpretation of the holding of *Trinity Lutheran*.[56] A broader interpretation of free exercise will likely threaten state constitutional provisions that exclude religion.

III. Decisions Implicating State Constitutions

Notwithstanding the recent Supreme Court holding in *Trinity Lutheran* and *Locke*, state supreme courts have been reluctant to extend historic preservation funding to churches. Both the

[52] *Id*. at 2024, n. 3.
[53] Chief Justice Roberts and Justices Alito, Kagan, and Kennedy. Justice Breyer joined only in the judgement.
[54] *Trinity Lutheran* 137 S. Ct. at 2026 (Gorsuch, J. concurring in part).
[55] *Id*. at 2026 (Breyer, J. concurring in judgment).
[56] Justice Kavanaugh wrote a concurrence to the denial of certiorari for *Morristown Board of Chose Freeholders v. FFRF*, which is discussed later.

New Jersey and Massachusetts Supreme Judicial Court held their state constitutions precluded historic preservation funding of religious building.

Despite the arguably narrower free exercise framework of religious funding cases predating *Trinity Lutheran,* the Sixth Circuit found in favor of funding prior to the 2017 Supreme Court decision. The Supreme Court of Vermont similarly found in favor of funding historic preservation grants in 2017, months after the Court decided *Trinity Lutheran*. In both instances, the churches were permitted to draw from general benefit grant programs.

A. *American Atheists Inc. v. City of Detroit Downtown Development Authority*

In the 2009 case, *American Atheists Inc. v. City of Detroit Downtown Development Authority,* American Atheists brought suit, "claiming that the agency's transfer of tax-generated funds to the churches violates the Establishment Clause of the Federal Constitution and its counterpart in the Michigan Constitution."[57] The Sixth Circuit held that the grant of aid to three Detroit area churches did not violate the Establishment Clause in the US Constitution nor the Michigan corollary, which is a Blaine Amendment. The court reasoned that the a violation did not occur because, the grants were from a general fund used to "increase the sense of security, community, and continuity for existing and future developments"[58] Although these funds were not for historic preservation, the analysis is similar as the Detroit fund was a general benefit fund used for the maintenance of the exterior of buildings.

The factual background is as follows. The Detroit Downtown Development Authority established the Lower Woodward Façade Improvement Program in 2003, to revitalize the downtown area for upcoming big-ticket sporting events, including 2005 MLB All-Star Game, 2006 NFL Super Bowl, and 2009 NCAA Final Four.[59] The program's objective was to "encourage

[57] Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278, 284 (6th Cir. 2009).
[58] *Id*. at 282.
[59] *Id*.

improvements to building facades and upgrades to edges of surface parking lots."[60] To accomplish this goal, the Development Authority disbursed approximately 11.5 million dollars, allocating up to 150,000 to each façade improvement and 30,000 to each parking lot improvement. In addition, funding was limited to an area contained within nine-blocks.[61]

There were 91 projects completed using the funding provided by the Lower Woodward Façade Improvement Program.[62] Of those 91, nine projects were completed by the following three area churches. Central United Methodist received four grants, two for exterior improvements, two for parking lot improvements.[63] Second Baptist Church similarly received four grants: one for repairs to the church itself, including repairing stained glass windows and the church sign; two grants for repairs to other church buildings; and one grant for the church parking lot. St John's Episcopal Church received one grant used for repairs of a stained glass windows and church sign.[64] The three churches received $735,000 of the 11.5 million dollars disbursed by the program.[65]

American Atheists sued and sought declaratory and injunctive relief. They claimed the agency's transfer of tax generated funds to a religious institution violated the Establishment Clause of the Federal Constitution and the Michigan corollary.[66] The Eastern District of Michigan found in favor of the City's program, except for the cost of replacing church signage, and the grants provided to St. John's Episcopal Church for the protective glazing of stained glass windows.[67][68]

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[60] *Id*.
[61] *Id*. at 283. There is an additional requirement that the property owner or tenant provide at least 50 percent of the total cost of the project.
[62] *Am. Atheists*, 567 F.3d at 283.
[63] *Id*. The grants were used in the following ways, as characterized by the court, "Central United Methodist Church received four grants: one for repairs to the exterior of the church (including renovation of the building facade, entry door, outdoor sign, steeple clock and light fixtures); another for similar repairs to the church's activities building; and two more for improvements to the church's parking lots."
[64] *Id*.
[65] *Id*. at 284
[66] *Id*. at 284.
[67] *Id*.
[68] The funding for Second Baptist's repair of their stained glass windows was upheld by the Eastern District of Michigan because they did not contain any overt religious imagery. The court's opinion helpfully appended more detailed descriptions of the windows. Second Baptist was described as "All the windows contain darkly shaded, clear glass with no identifiable imagery." The windows in St. John's were described as "Two windows contain

The Sixth Circuit concluded that the Façade Improvement Program was, as a whole, constitutional. It was a facially neutral program, not created to favor one religion, and did not operate in effect to advance religion.[69]

As applied to St. John's Church, on the two narrow issues of the funding for the stained-glass window glazing and signage, the Sixth Circuit reversed the district court. Regarding the stained-glass window depicting religious imagery, the court narrowed the question and was more precise on the work completed on the church. The court pointed out the stained-glass window itself, which contained religious imagery, was not replaced, rather the storm windows covering the stained glass was replaced. Though replacing the storm window would make the stained glass easier to see, it does not transform the clear storm window into a religious image.[70]

Similarly, the sign the church used did not contain any overt religious imagery. The only flourish contained on the signage were fleur-de-lis.[71] The court continued to explain that even if the governmentally subsidized signage was diverted for the purpose of advancing religion, there would be no issue of government endorsement, as the funds stem from such a broad, general program. The court summed this issue up nicely, "when the government endorses everything it endorses nothing."[72]

The court did point out that textually, the Establishment Clause and Michigan's corollary are quite different. Michigan's Establishment Clause is a Blaine Amendment, and reads:

> Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of

images. One image appears to be of a standing figure dressed in a blue gown with a halo upon its head. The second image appears to be a standing figure dressed in a dark-colored gown." *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 503 F. Supp. 2d 845, n. 22 (E.D. Mich. 2007), *aff'd in part, rev'd in part*, 567 F.3d 278 (6th Cir. 2009)

[69] *Am. Atheists*, 567 F.3d at 289-291.

[70] *Id.*at 293.

[71] *Id.*

[72] *Id.* at 294.

> religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.[73]

Despite the differing verbiage of the Michigan and Federal constitution, the *American Atheist* court was dispositive of the issue of the Façade Improvement Program violating the Michigan constitution. They viewed the Michigan constitution in light of the Federal Constitution, as Michigan courts use the same Establishment Clause tests when evaluating issues under their State Constitution and have held that it offers the same protections as the Federal corollary.[74]

The court saw the Façade improvement Program as dissimilar to the "maintenance and repair" program struck down in *Nyquist.* The court reasoned only six percent of the programs funds went to churches, it was a one-time grant, and the funds were to "designed to spruce up downtown Detroit, the state program in Nyquist kept the lights on at each religious school."[75] The program was sufficiently distinct from *Nyquist* and did not have the impermissible effect of advancing religion.

Though not an issue of historic preservation, *American Atheists* offers a glimpse of how a funding for church maintenance was upheld as administered in a general benefit grant program.

B. *Taylor v. Town of Cabot*

Narrowing the scope to historic preservation, the Vermont Supreme Court decided *Taylor v. Town of Cabot* in 2017. In *Taylor,* the primary claim was that the grant of municipally managed funds violated the Compelled Support Clause of the Vermont Constitution. The case concerned an interlocutory appeal regarding a preliminary injunction and standing. The court held that the Plaintiff did have municipal-taxpayer standing to sue, but did not demonstrate a likelihood that

[73] MICH. CONST. art I, § 4.
[74] *Am. Atheists,* 567 F.3d at 301 (citing *Scalise v. Boy Scouts of Am.*, 692 N.W.2d 858, 868 (Mich. Ct. App. 2005)).
[75] *Id*. at 298.

they would succeed on the merits of their claim, the requisite standard for a preliminary injunction.[76] The court reasoned the grant to the church did not violate the compelled support clause, and warrant a preliminary injunction, because the grants were available to a large number of groups; the grants had the secular purpose, to "enhance the quality of life and the character of the town, promote commercial development consistent with the scale and character of the community, promote education, and improve community infrastructure, facilities, and services for maintenance and repair";[77] and the church's useful purpose for the grant, to make exterior repairs was not sufficiently linked to worship to violate the clause.[78]

The church in this case proposed to use a ten-thousand-dollar grant to fund approximately a nineteen-thousand dollar project that included painting the exterior of the church, and repairing and examining sills on the building.[79] This aided the courts inquiry as all grant money would be used for exterior sections of the church.

The Article III to the Vermont Constitution reads in pertinent part, "no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience."[80] Vermont's own case law places emphasis on the word worship.[81] In doing so, the court asked whether the historic preservation funding, used to paint the exterior of a church and pay for inspections of interior sections ran afoul of the clause, and warranted a preliminary injunction.[82] The Vermont Supreme Court placed this case in the context of Supreme Court precedent, saying that this case is "admittedly" between the training of clergy in *Locke* and paying for a playground in *Trinity Lutheran*, but concluded that the

[76] Taylor v. Town of Cabot, 178 A.3d 313, 325 (2017).
[77] *Id*. at 324.
[78] *Id*. at 324-5.
[79] *Id*. at 322.
[80] V.T. CONST. art I, § 3.
[81] *See Taylor* 178 A.3d at 313, n. 23, *citing Chittenden Town Sch. Dist.*,169 Vt. at 325, 738 A.2d at 550.
[82] *Taylor* 178 A.3d at 322.

argument that the compelled support clause precludes the use of public funds for any repair to a place of worship is "legally questionable."[83] As this case only regards the denial of a preliminary injunction, so the Vermont Supreme Court could not be dispositive of the issue of the compelled support clause, and only decided that the Plaintiff did not meet the heightened burden required to grant a preliminary injunction. The court remanded the case to decide the Compelled Support Clause issue, but there was no subsequent litigation.

C. Caplan v. Town of Acton

A year after *Taylor*, the Massachusetts Supreme Judicial Court heard *Caplan v. Town of Acton*. *Caplan* is similar to *Taylor* in that it involves a preliminary injunction sought by local taxpayers to cease payment of historic preservation funds to a church.[84]

The Plaintiffs in *Acton* claimed that the issuance of grants to churches violate the Massachusetts anti-aid amendment.[85] The Massachusetts Supreme Judicial Court held that the plaintiffs did meet their burden in showing a likelihood of success on the merits warranting a preliminary injunction on the issue of the stained glass grant to the church, as the grant had the effect of substantially aiding the church in its religious function.[86] The court reasoned that the funds, despite their historic preservation intentions, "fail(ed) to avoid the very risks that the framers of the anti-aid amendment hoped to avoid"[87] as they were to be used to refurbish a stained glass window with religious imagery.

The factual background of *Caplan* is as follows. The town of Acton awarded the Acton Congregational Church grants through the Community Preservation Act. The Act allots money from a discretionary fund, allowing towns to "make discretionary grants to projects relating to

[83] *Id.* at 323.
[84] Caplan v. Town of Acton, 479 Mass. 69, 74 (2018).
[85] *Id.* at 74.
[86] *Id.* at 95.
[87] *Id.*

open space, historic resources, and community housing."[88] There were two grants awarded, one for a "Master Plan" for which the court found there was insufficient discovery to determine if the Plaintiff would likely succeed on the merits. Therefore, for the Master Plan grant, the court ordered remand.[89] The more contentious issue was the stained-glass grant. Said grant was for $51,237, and the most prominent window, for which funds would be used, depicted Jesus and a kneeling woman. Proposed work included replacing parts of the glass, sealing the glass, and installing new glazing.[90] In granting the preliminary injunction, thus denying the stained glass grant, the Massachusetts Supreme Judicial Court relied on and adapted a three part test laid out in *Commonwealth v. School Comm. of Springfield*[91] a private school funding case. The factors in Springfield are "(1) whether the purpose of the challenged statute is to aid private schools; (2) whether the statute does in fact substantially aid such schools; and (3) whether the statute avoids the political and economic abuses which prompted the passage of [the anti-aid amendment]."[92] The court adopted this test, as applied to the second clause of Article 18's anti aid amendment, though of course applied to churches or religious denominations, not schools.[93]

To understand the application of the Springfield test it is important to the no-aid clause of Article 18. The no-aid clause is a Blaine Amendment. Massachusetts was the last state to entirely disestablish its state church in 1833 and has one of the most expansive Blaine Amendments.[94] The Amendment reads:

> No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not

[88] *Id.* at 86.
[89] *Id.* at 95.
[90] *Id.* at 73.
[91] *Id.* at 74 (Commonwealth *v. School Comm. of Springfield*, 382 Mass. 665 (1981)).
[92] *Caplan*, 479 Mass. at 74 (quoting *Springfield* 382 Mass. at 675).
[93] The court in *Springfield* held "here are no simple tests or precise lines by which we can determine the constitutionality of grants challenged under the first clause of the anti-aid amendment." *Springfield* at 675
[94] *Caplan*, 479 Mass. at 76.

> publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the commonwealth or federal authority or both,…and *no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society*…[95]

On the purpose prong of the test, the court was fairly dispositive of the issue as the grants in question, used for historic preservation, did not appear to have an overt religious purpose. The grants were what they purported to be, historic preservation grants; they were conditioned, limiting future use and modification of the building.[96] The court ordered remand on this issue, to allow for discovery, as the plaintiff would have to try to prove there was a "hidden purpose". [97]

On the substantial aid prong, the court had more to say. Prior Massachusetts cases allow funding if it is minimal[98] or remote.[99] However, the funding in these cases would be substantially borne by the State. For the Master Plan, $49,500 of the $55,000 project total was set to be paid by grant. For the stained glass grant, $51,237 of the $56,930 project total was to be paid by state grant.[100] The court raised the concern that though these funds are allotted for historic preservation purposes, the effect they have is to allow the church to defray cost from maintenance and restoration, and reallocate these funds originally earmarked for maintenance towards religious services. The state would be underwriting the essential function of a house of worship, thus concluded the effect of the grants would be to "substantially aid the church."[101] This seg ways into the final prong of the Springfield test.

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[95] MASS. CONST. art. 18 § 2 (emphasis added).
[96] *Caplan*, 479 Mass. at 87.
[97] *Id.* at 87-88.
[98] *Id.* at 88 (quoting Attorney Gen. v. School Comm. of Essex, 387 Mass. 326, 332 (1982)).
[99] *Id.* at 88 (quoting Bloom v. School Comm. of Springfield, 376 Mass. 35, 47(1978)).
[100] *Caplan v. Town of Acton*, 479 Mass. at 88.; *See also* James F. McHugh, *Religion in the Public Square*, 100 MASS. L. REV. 53, (2019).
[101] *Id.* at 90.

The risks prong asks whether the grants in question "avoid the risks that prompted the passage of the anti-aid amendment."[102] The court points out three instances in which risks of economic or political abuse are possible. First, it infringes on the taxpayer's right to a liberty of conscience. The grant poses a risk of compelling those who do not subscribe to the Church or the Congregationalist belief to pay taxes that would support a church.[103]

The second issue is that of government entanglement. The entanglement issue looms over the stained-glass grant. The court points out the historic preservation grants and landmarks designation make future modification of the exterior subject to government approval. If applied to the stained glass window, it blurs the interior-exterior distinction, as it is available to public view, but not purely interior, where the church has "the right freely to design interior spaces for religious worship."[104] The reason being "[t]he configuration of the church interior is so freighted with religious meaning that it must be considered part and parcel of ... religious worship."[105] However, the stained glass window tends to be more an object "freighted with religious meaning", especially as the one in this case depicts Jesus.

The third issue raised by the court is that the grants "risk threatening 'civic harmony,' by making the 'question of religion' a political one."[106] In essence the risk here is that people in the community will be aggravated by the use of government funds for a religious institution. The court explains, "Grants for the renovation of churches—using funds that could potentially have been dedicated to open space, soccer fields, low-income housing, or other historic preservation projects …pose an inevitable risk…, the more so where those grants are for the renovation of a worship

[102] *Id*.
[103] *Id*.
[104] *Id*. at 92 (quoting Society of Jesus of New England v. Boston Landmarks Comm'n, 409 Mass. 38, 42, 564 N.E.2d 571 (1990)).
[105] *Id.* (quoting *Society of Jesus*).
[106] *Caplan* at 93, (quoting *Bloom,* 376 Mass. at 39).

space or of a stained glass window with explicit religious imagery."[107] The court does note that this prong is not dispositive, but important.[108]

The court detailed possible ways to bypass the risk prong. One way would be if a "historical events of great significance occurred in the church, or where the grants are limited to preserving church property with a primarily secular purpose."[109] A historical significance test ought not be a road the courts travel. Of course, there are historic religious properties central to American history, such as Old North Church, discussed in the OLC memo, but the courts should not be engaged in value judgements as to whether a property is important enough to receive historic preservation funding. This reasoning will lead to uncertainty and in increase in litigation.

Largely reliant on the risk prong, the court granted the preliminary injunction as to the stained-glass grant, but remanded for further discovery on the Master Plan grant. The court did not delve into detail about the effect of *Trinity Lutheran* based on their holding. Rather, the court brushed *Trinity Lutheran* aside by stating the three factor *Springfield* test is not a categorical ban; therefore, *Trinity Lutheran* need not be addressed.[110]

D. *Freedom From Religion Foundation v. Morris County Board of Chosen Freeholders*

In line with the holding of the Massachusetts Supreme Court, the New Jersey Supreme Court decided *Freedom From Religion Foundation v. Morris County Board of Chosen Freeholders* (FFRF) in 2018. The issue in this case was whether the 4.6 million dollars awarded to Morris County churches, which had active congregations, violated the Article III to the New Jersey Constitution, specifically the Religious Aid Clause.[111] Plaintiffs brought suit claiming the grants to the churches were unconstitutional and violated the substantive constitutional rights

[107] *Id*. at 93-94.
[108] *Id*. at 94.
[109] *Id*. at 94.
[110] *Id*. at 85.
[111] The Religious Aid Clause has the same effect as the compelled support/no-aid clauses discussed previously. The New Jersey Supreme Court refers to the provision in the New Jersey Constitution as a Religious Aid Clause.

under the New Jersey Civil Rights Act.[112] The New Jersey Supreme Court reversed the trial court holding the grants to the twelve Morris County churches ran afoul of the New Jersey Religious Aid Clause.[113] The court reasoned that the plain language of the Religious Aid Clause barred the use of taxpayer funds for the maintenance or repair of a church, regardless if the funds are used for historic preservation. It reads, "…nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship…"[114]

The court considered the history of New Jersey's Religious Aid Clause, is dissimilar to a Blaine Amendment as it pre-dates Blaine. The opinion cited both the 1947 and 1776 New Jersey Constitution. The verbiage of the 1947 amendment is like that of New Jersey's 1776 Constitution.[115] The Constitution of 1947 continues the tradition of the 1776 Constitution by preventing the compelled support of "building or repairing" of churches.[116]

On the issue of historic preservation and separation the court says "for most of its existence, the Religious Aid Clause has banned public funding to repair a house of worship without regard to some other non-religious purpose. In short, there is no exception for historic preservation."[117] The court contrasted the New Jersey clause to Massachusetts, in *Caplan*, in which the Massachusetts Constitution, Article 18 is modified with the term "purpose".[118] Article 18 of the Massachusetts reads "The *purpose* of founding maintaining or aiding any church…"[119] New Jersey's Constitution contains no such intent/purpose element and not require an inquiry into such.

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[112] *Freedom From Religion Foundation*, 232 N.J. at 552.
[113] *Id*. at 567.
[114] NJ CONST. art.I, § 3.
[115]The 1776 constitution read, in its pertinent part, "nor shall any Person within this Colony ever be obliged to pay Tithes, Taxes, or any other Rates, for the Purpose of building or repairing any Church or Churches, Place or Places of Worship, or for the Maintenance of any Minister or Ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform. (N.J. CONST. of 1776 art. XVIII)
[116] *Id*.
[117] *Freedom From Religion Foundation*, 232 N.J. at 565-566.
[118] MASS. CONST. art. 18 § 2; *Freedom From Religion Foundation*, 232 N.J. at fn 5.
[119] MASS. CONST. art. 18 § 2; (*emphasis added*)

The court's dismissal of an inquiry into the intent of funding makes it difficult to imagine an instance in which funding, beyond fire, police, and public welfare would be permissible.

The New Jersey Supreme Court reconciled the Supreme Court's holding in *Trinity Lutheran* by construing the case in a narrow lens, in reliance on footnote three. The court found, "The holding of Trinity Lutheran does not encompass the direct use of taxpayer funds to repair churches and thereby sustain religious worship activities. We therefore find that the application of the Religious Aid Clause in this case does not violate the Free Exercise Clause."[120] The New Jersey Supreme Court therefore escapes a detailed inquiry as this is not a case about playground funding.

The court viewed the case more akin to *Locke*. The court reasoned "New Jersey's historic and substantial interest against the establishment of, and compelled support for, religion is indeed 'of the highest order.'"[121] Despite the Court in *Trinity Lutheran* finding that general establishment clause concerns did not survive strict scrutiny in the face of what the Court found to be a facially discriminatory policy, the New Jersey court appeared unphased by this issue because of the historical difference between the discriminatory Blaine Amendment in *Trinity Lutheran* and the Religious Aid Clause in the New Jersey Constitution,[122] as the Religious Aid Clause had the purpose of strict separation of church and state.[123] The court continued to equate *FFRF* to *Locke* on the reasoning that the respondent, Davey was denied funding for what he did, (seek a devotional theology degree to join the clergy), not who he was (a person of faith). The court wrote:

> The same construct applies here: the Churches are not being denied grant funds because they are religious institutions; they are being denied public funds because of what they plan to do—and in many cases have done: use public funds to repair church buildings so that religious worship services can be held there.[124]

[120] *Freedom From Religion Foundation*, 232 N.J. at 578.
[121] *Id*. at 577 (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)) (internal citations omitted).
[122] *Id*. at 578.
[123] The NJ Supreme Court construed the No Aid Clause as reflecting the experience of many settlers to "…escape the bondage of laws which compelled them to support and attend government-favored churches" (*Id*. at 576).
[124] *Id*. at 575.

The holding in *FFRF* explicitly stated that the churches were not denied because of their identity, but in effect, this process did deny religious organizations a general benefit based on identity. The court reasoned that it is irrelevant if a general benefit fund had the purpose of historic preservation, as the Religious Aid Clause does not have a purpose inquiry.[125] Based on this denial, there is effectively two-step process for a church to be eligible for a general benefit fund. First, disregard the legislative intent of the general benefit fund. Second, deny churches who use funds to maintain buildings. Based on the church's identity as a church, the legislative intent of general benefit funds is disregarded. This first step only applies to churches (and other religious entities), and its application is dependent on identity.

The New Jersey Supreme Court also distinguished this case from the decision in *American Atheists*. The court stressed that the funds distributed by the Morris County program were not narrowly tailored like the Detroit program. The court noted some of the uses of funds being for the interior of churches, HVAC systems, slate roofing, and stained-glass windows. Some included stipulations that the funds would be used to continue church services, as well as for use by the community.[126] The court deemed this would have the "primary effect of advancing religion" under *Nyquist.*[127] The Court also deemed *American Atheists* inapposite because the grants in that case "did not include religious uses of funding."[128] However, the court did not delve into detail, as the Sixth Circuit did as to how the varying applications of grants may or may not be religious uses, as in *American Atheists* stained-glass windows without religious imagery were refurbished, and glazing covering a window with religious imagery was refurbished.[129]

[125] *Id*. at 560, 566.
[126] *Id*. at 574.
[127] *Id*. at 575.
[128] *Id*. at 578.
[129] *Id*. at 578-580.

The New Jersey Supreme Court also noted that this case differed from the opinion in *American Atheists*, as in that case, the funds were dispersed as a one-time payment. Here, if the funding recipient received more than $50,000 of historic preservation funding, there is a lengthy thirty-year relationship between the recipient of the funds, and Morris County in the form of an easement.[130] The court does not delve into the detail of *Lemon* or the Lemon test, but they are likely implicating the excessive entanglement prong. However, the easement guarantees public access for individuals to historic landmarks. Historic preservation is a public benefit, to preserve and permit access to places deemed important to American history.[131] The idea that if the state guarantees this benefit through a simple notation in the county clerk's office, it creates excessive entanglement, and denies this benefit to historic religious buildings, is questionable.

FFRF was appealed to the United States Supreme Court. Certiorari was denied for two reasons. First, more time was needed to allow case law to develop post-*Trinity Lutheran*. Second, the factual record of *FFRF* was lackluster, likely because the case bypassed the New Jersey Appellate Division and was granted direct certification to the New Jersey Supreme Court.[132]

Justice Kavanaugh penned a concurrence to the denial in which Justices Alito and Gorsuch joined. Kavanaugh has, in a sense, shown which side of the aisle he would fall on in a Free Exercise case. He wrote "the decision of the New Jersey Supreme Court is in serious tension with this Court's religious equality precedents."[133] He stated, "Barring religious organizations because they are religious from a general historic preservation grants program is pure discrimination against religion."[134] If Justice Kavanaugh's reasoning were adopted in some future case, that does not necessarily mean religious organizations have free range to do as they wish with historic

[130] *Id*. at 579.
[131] *See supra* note 1.
[132] *Freedom From Religion Foundation*, 232 N.J. at 553.
[133] Morris Cty. Bd. of Chosen Freeholders v. Freedom From Religion Found., 139 S. Ct. 909, 910 (2019) (Kavanaugh, J., concurring in the denial of certiorari).
[134] *Id*. at 911.

preservation funding. In speculation, reasonable boundaries should be established, such as allowing funding be used for the exterior of the building, but not interior where services are performed. However, it does mean that a state constitutional restriction on aid—whether from the founding or Blaine era—will fall to the Free Exercise Clause

An element that can be gleaned from all these cases is that if a grant is used to directly fund religious imagery it is per se impermissible. *American Atheists* permitted funding for signage, and most controversially, glazing (a storm window) to cover a stained-glass window. *Taylor* permitted funding for exterior painting and interior consultation for windowsill repair. *Caplan* disallowed a grant allotted to fund the refurbishment of a stained-glass window depicting Jesus. *Freedom From Religion Federation* was more expansive in its outcome. *FFRF* upended stained glass replacement depicting religious imagery, which falls in line with the three prior cases, but went further. Grants to repair the exterior, replace roofs, and for consulting were similarly denied. The outcome of these four cases demonstrate the state of flux free exercise jurisprudence stands. It is in conflict with many state constitutions whether they contain a Blaine Amendment or similar clause that pre-dates Blaine. Though Blaine Amendments carry the apparent discriminatory, anti-Catholic history, the effects of each are the same. As demonstrated by the outcomes in Massachusetts and New Jersey, the effects of clauses exclude churches from general benefit funds.

IV. Free Exercise moving Forward and Espinoza

Not implicating historic preservation, but a Blaine Amendment in relation to education is *Espinoza v. Mont. Dep't of Revenue*[135], currently before the Supreme Court. In *Espinoza* the Plaintiff's brought suit claiming Rule 1 of a Montana Tax Credit Program was unconstitutional as

[135] *Espinoza v. Mont. Dep't of Revenue* 435 P.3d 603 (2018).

it violated the Free Exercise clause of the Montana and United States Constitutions.[136] The Tax Credit provides a taxpayer a "dollar-for-dollar tax credit of up to $150 based on her donation" to a Student Scholarship Organization (SSO).[137] The SSO then assigned funding to a Qualified Education Provider (QEP). Rule 1 categorically excluded religious schools from the definition of QEP, rendering them ineligible for education funding through SSO. In short, Rule 1 was an attempt to comply with the state Blain Amendment, similar to the Missouri Department of Natural Resources policy in *Trinity Lutheran*. The district court found in favor of the Plaintiffs. On appeal, the Department of Revenue argued that absent the prohibition in Rule 1, the entire program was unconstitutional, as it provided funding to a religious school in violation of Article X, Section 6 of the Montana Constitution, a Blaine Amendment.[138][139] The case went to the Montana Supreme court for consideration without the limiting factor of Rule 1.

The Montana Supreme Court held that the Tax Credit Program was unconstitutional, as it did exactly what the legislature sought to preclude in Article X, Section 6. It transferred money to sectarian schools.[140] The court reasons that the Program permits indirect payment of tuition to religious institutions[141] Coming to the conclusion that the Tax Program violates the Montana Constitution, the court dismissed free exercise concerns, simply saying, this is not one of those cases.[142] The court further stated that this is a case where there is "'room for play' between the

[136] *Id.* at 608.
[137] *Id.* at 606.
[138] *Id.* at 604.
[139] Montana's Blaine Amendment reads "The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." MONT. CONST. art. X, § 6.
[140] *Espinoza*, 435 P.3d at 614.
[141] *Id.* at 613.
[142] *Id.* at 614.

joints of the Establishment and Free Exercise Clauses"[143] without further explanation how this is one of those cases, like *Locke* that truly falls between the two.

Espinoza is factually similar to *Nyquist,* but in *Nyquist* the tuition reimbursement plan was invalidated on Establishment Clause grounds.[144] This demonstrates how far Establishment Clause and free exercise jurisprudence has shifted since 1973. Allowing a tuition subsidy in 1973 offended the Establishment Clause, now in 2019 disallowing a similar benefit to a sectarian school may offend the Free Exercise Clause.

The outcome of *Espinoza* at the Supreme Court may affect the future outcome of cases where the Free Exercise Clause and state constitutions conflict in the historic preservation context. The issue before the Court is "Whether it violates the religion clauses or the equal protection clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools."[145] Assuming the court finds for the Department of Revenue, the holding may not be as far reaching as it may seem at first blush. The Court has already faced religious funding (or religious funding in effect) cases, *Locke* and *Nyquist,* where it allowed the exclusion of religious activity from funding programs. As mentioned in the OLC memo and in *Locke*, an education case is when the Establishment Clause is at its height. Therefore, there is still room to argue that, even if a generally available education fund available to religious schools violates the Establishment Clause, a historic preservation grant may not.

The larger issue is the state law conflict with the Free Exercise Clause. Even if the Court found in favor of Espinoza, and found a violation of the Free Exercise Clause, Blaine Amendment and compelled support clauses may still be constitutional, but the interpretation limited. States

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[143] *Id*.
[144] *Nyquist*, 413 U.S. at 794.
[145] *Espinoza v. Montana Department of Revenue*, SCOTUSBLOG.COM, https://www.scotusblog.com/case-files/cases/espinoza-v-montana-department-of-revenue/ (last visited Dec. 12, 2019).

such as New Jersey may still be apprehensive to allow funding in other contexts, especially given the differing historical backgrounds. The historical, anti-Catholic taint, of the Blaine Amendments may impact the Court's decision. However, the Court is unlikely to explicitly upend the constitutions of 37 Blaine Amendment states and more with compelled support clauses. In short, no matter how the Court rules in *Espinoza*, it is unlikely that this is the last free exercise case the Court will hear in the near future, and historic preservation for religious buildings, at a state level, will continue to be an open question.

Conclusion

Currently, Free Exercise jurisprudence is in a state of flux. Seemingly expanded by *Trinity Lutheran* but subsequently restrained by the four-Justice footnote three, *Espinoza* appears poised to at least resolve the issue of how broad to interpret the holding of *Trinity Lutheran*, an issue lower courts have grappled with since 2017. Since Justice Kennedy's departure, his replacement Justice Kavanaugh, already is already showing his Free Exercise leanings in the *FFRF* certiorari denial. As such, it is foreseeable that the Court will continue to expand Free Exercise beyond the restraints of footnote three.

When removed from the limiting factor of footnote three, a historic preservation fund falls into the fold of a general benefit fund a religious organization is eligible for and entitled to participate in. Denying a religious organization a historic preservation grant that another entity or organization would be granted for a substantially similar physical use, is a violation of the Free Exercise Clause as it forces an entity to denounce its religious character to be eligible.